No. 1258

IN THE

Supreme Court of the United States

D. M. CAROTHERS, SPENCER J. SCOTT AND LEE PRICE, A CO-PARTNERSHIP DOING BUSINESS AS ALLRIGHT PARKING SYSTEM, LIMITED.

v.

CHESTER BOWLES, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE EMERGENCY COURT OF APPEALS

D. M. CARTHERS, SPENCER J. SCOTT AND LEE PRICE, A CO-PARTNERSHIP DOING BUSINESS AS ALLRIGHT PARKING SYSTEM, LIMITED.

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Attorneys for Petitioners,

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To The Honorable Supreme Court of the United States:

Your petitioners, D. M. Carothers, Spencer J. Scott and Lee Price, a co-partnership, doing business as Allright Parking System, Limited, respectfully petition this court to review on writ of certiorari a decision of the United States Emergency Court of Appeals rendered on April 11th., 1945 in a certain cause No. 177 in said United States Emergency Court of Appeals, entitled *D. M. Carothers et al v. Chester Bowles*, Price Administrator, by which judgment said United States Emergency Court of Appeals dismissed the complaint of said petitioners.

Statement of the Matter Involved.

As stated in the opinion of the Emergency Court of Appeals (R 126), petitioners own a lease on a lot in Dallas, Texas. By lines marked upon the lot they have divided it into 50 spaces, each large enough to hold one car. These spaces they rent to car owners at an agreed rental. The car owner rents a space, drives his car onto the space, parks and locks it and retains the key. The car remains in this space until the car owner removes it. Sometimes petititoners have a cashier on the premises to collect the rentals; sometimes they do not and the car owner deposits the correct amount of rental in an envelope provided for that purpose and drops the envelope through an opening in the office door. Petitioners never have any control over the car. It is never in their possession and they assert no dominion or control over the rented space and assume no responsibility. They never touch the car or its keys and they furnish no services whatever to the car or its owner. In fact they have nothing whatever to do with the car. The car never leaves the owner's charge, custody or control, and the owner remains entirely responsible therefor the same as if he had left it in any other space owned or controlled by him. (R. 13.)

Petitioners were charging agreed rentals for the rented spaces when the Price Administrator made an order fixing the ceiling price on such rentals and ordering Petitioners to discontinue charging prices in excess of the ceiling rentals, the ceilings being below

the charges of Petitioners for the rentals on such spaces. (R. 17-19.)

Petitioners in due time filed their protests against this order and against Maximum Price Regulation Schedule No. 165 (Services), as amended on July 1st., 1944, in so far as it undertook to regulate such rentals, if it did. (R. 1-31.) Such protests were denied by the Administrator by an order dated September 27th., 1944. (R. 102.)

On October 23, 1944, Petitioners duly filed their complaint in the United States Emergency Court of Appeals against the Administrator praying that such orders and regulations be enjoined and set aside, especially in so far as they attempted to control and regulate Petitioners' space rentals and the charges therefor (R. 109). This cause was heard in the United States Emergency Court of Appeals on January 29th., 1945 and decided on April 11th., 1945 (R. 130) (Opinion of the Emergency Court of Appeals, R. 126). Said court held that the Administrator was authorized by the act to regulate Petitioners' said rental charges (R. 129) and entered judgment dismissing the complaint (R. 130).

The grounds on which Petitioners protested such orders and regulations in their protest before the Price Administrator and upon which they contended that same should be enjoined and set aside in their complaint in the Emergency Court of Appeals as shown by the complaint (R. 112) and the admissions in the answer (R. 117, par. 8), are as follows:

(a) The order of the Price Administrator fixing the maximum of rentals to be charged by your Petitioners is not authorized by the Emergency Price Control Act of 1942, or any amendment thereto, or any other enactment or statute of the United States.

(b) *Park & Lock Space Rental* is not within the terms of said Act or any amendment thereto.

(c) *Park & Lock Space Rental* creates a relationship of landlord and tenant and is in no way subject to the control of the Emergency Price Control Act or any amendments thereto.

(d) Under the *Park & Lock Space Rental,* as conducted by Petitioners, Petitioners have no possession of, or control over, the automobile that occupies the space rented. Petitioners render no services whatever in connection with this space rental. Petitioners at times have no employee of any kind at the premises where the space is rented and those who rent space deposit the rental charged therefor in a receptacle provided for that purpose. At other times Petitioners have a cashier employed to whom those renting space pay in advance the charge therefor, but such cashier in no way acts as watchman or custodian and renders no services whatever in connection with the space rented or otherwise to the party renting such space, her sole authority being to collect the charges for such space rentals.

(e) It was contended by Petitioners that Maximum Price Regulation Schedule No. 165 (Services), as amended on July 1st., 1944, in so far as such regula-

tion undertakes, if it does, to regulate the maximum price to be charged for such *Park & Lock Space Rental,* is authorized and invalid for the same reasons.

All of the material fact allegations made by your petitioners in their complaint in the Emergency Court of Appeals (R. 109-113) were specifically admitted by the Administrator in his answer thereto (R. 114-117).

Reasons For the Allowance of the Writ

1. The Emergency Court of Appeals erred in enering the order dismissing the complaint.

2. The Emergency Court of Appeals erred in holding that the word "storage" was used in the statutory definition in a sufficiently comprehensive sense to include the parking by members of the public of their own automobiles upon a space rented by them for that purpose.

3. The Emergency Court of Appeals erred in holding that while "It may be conceded that one who rents a piece of ground to the owner of an automobile in order that the latter may store his car upon it, without more, is not engaged in a storage service within the meaning of the Act, but is merely engaged in the renting of real estate," still if Petitioners mark their lot off with suitable spaces, light it, clean it, and keep it in suitable condition, and provide a common entrance for those who desire to rent space as well as a common means for exit, they are performing services for the car owners which bring them within the meaning of the Emergency Price Control Act, and

that the Administrator's orders and regulations as applied to petitioners are valid.

The questions involved are of the greatest general importance and they involve questions of substance relating to the construction of a statute of the United States, towit the Emergency Price Control Act of 1942, which questions have not been, but should be, settled by this court.

The meaning of the word "storage," as used in the Act, is of very great importance. The dictionaries give the primary meaning of this word as "The safe keeping of goods in a warehouse or other depository." This involves the relationship of bailor and bailee. This is the generally accepted meaning of the term as used in commercial circles and is clearly the meaning contemplated by Congress when the act was enacted. It involves the placing of goods belonging to one person in the care and custody of another.

The opinion of the Emergency Court of Appeals quotes the Administrator as defining "storage" as "the provision of an appropriate and convenient place for commodities when not in use." (R. 128.) This is an attempted original definition apparently not found in the dictionaries and quite inaccurate.

The Administrator, however, cites as his authority the definition of the verb "store," as contained in Funk & Wagnall's New Standard Dictionary of 1940 which he says is: "To put away for future use, especially for future consumption." The Administra-

tor contends that this is the meaning of the word as it is used in the Act. (R. 75, footnote 5.) In other words the Administrator contends that when a commodity is put away for future use or consumption, this constitutes "storage" within the meaning of the Act even though the owner puts away his own commodity on his own property or on property leased or controlled by him, and even though the commodity never passes out of the owner's possession or control.

In its opinion the United States Emergency Court of Appeals says that the word has varied usage (R. 128) and its meaning, as used by Congress, is to be determined by the context. On this basis the court decides (R. 129) that when an automobile owner parks his car on space rented by him for that purpose, this constitutes "storage" within the meaning of the Act (R. 129).

Of the huge number of buildings rented in the United States it would be hard to find one in which the lessee does not keep many commodities for future use, or consumption. Practically every manufacturing plant uses a large portion of its rented space to keep for future use or consumption its raw materials and its manufactured product. Practically every renter who is in the wholesale business uses part of his rented space in keeping for future use or consumption the goods on hand which he expects to sell in the future. Every renter of space used for retail merchandising uses a large portion of the rented space to keep commodities for future use or consumption. Every loft building in the United States rents to its

lessees space to be used by them in keeping commodities for future use or consumption. The Emergency Court of Appeals has held that everything that occupies space is a commodity within the meaning of the Act. Practically every office building in the United States leases space to tenants in which stationery, books, business records and furniture are kept for future use or consumption. Did Congress mean to classify all this as "storage"? If the Administrator is correct as to what Congress meant by the use of the word "storage," and if the word "storage" as used in the Act, has the meaning adopted in the opinion of the Emergency Court of Appeals, all of the rental transactions above referred to come within that definition.

The opinion of the Emergency Court of Appeals holds that wherever a man rents a space owned by him, this transaction constitutes "storage" within the meaning of the Act. Such an interpretation of the word defeats the evident intent of Congress and is fraught with very dangerous results wholly at variance with the evident intent of Congress.

On the other hand, if the word is given its primary and commonly accepted meaning it means the delivery of commodities by the owner to a warehouseman, bailee or other person to be kept until called for by the owner and this interpretation of the Act is what Congress evidently intended it to be.

So generally has the word "storage" come to refer in commercial parlance to depositing goods in a ware-

house or other depository for safe keeping that most of the states have passed "Uniform Warehouse Receipts Acts" regulating storage in order that the laws relating thereto may be uniform throughout the United States. Texas is among the number. Revised Statutes of Texas, Articles 5612-5665.

The Administrator contends that renting space to a person who uses same to keep therein commodities for future use or consumption constitutes "storage," within the meaning of the Act; that the sale or leasing of such "storage" is of itself a commodity within the meaning of the Act whether there are any services furnished in connection therewith or not; and that such "storage" is subject to regulation under the Act. The Emergency Court of Appeals does not follow the Administrator that far. It says in the opinion (R. 129):

"It may be conceded that one who merely rents a piece of ground to the owner of an automobile in order that the latter may store his car upon it, without more, is not engaged in rendering a storage service within the meaning of the Act, but is merely engaged in the renting of real estate." The act makes it clear that the Administrator has no control over rents except for housing accommodations in defense areas. U. S. C. A. App. Title 50, Section 902 (c). It has never been contended that Congress intended to authorize the control of business rentals or any rentals other than those for residential housing accommodations in defense areas. If the Administrator's theory as to the meaning of the word "storage" is correct, then the rental of practically every building in the United

States is subject to regulation by the Administrator, and if so, why did Congress make special provision for control of the rent of residential housing accommodations? The Administrator, according to the contention which he has urged in this proceeding, would have control of the rent of every house in the United States under the "commodity" provision.

None of the cases cited in the opinion of the Emergency Court of Appeals sustain its construction of the meaning of the word. On the other hand the other hand the cases of *Monument Garage Corp. v. Levy,* 266 New York 339, 194 N. E. 848, 849 and *Bowen v. Hider,* 37 N. Y. S. (2d) 76, 83, both hold that there is a substantial distinction between "storage" and "parking," and these cases were followed and approved in *Tres Ritos Ranch Co. v. Abbott* (Sup. Ct. of New Mexico) 105 P. (2d) 1070; *Gilsey Bldgs. Inc. v. Incorporated Village,* 170 Misc. 945, 11 N. Y. S. (2d) 694; and *Bazinsky v. Kesbec, Inc.,* 259 App. Div. 467, 19 N. Y. S. (2d) 716. *Williams v. Grier* (Sup. Ct. of Ca.) 26 S. E. (2d) 698 holds "parking" and "storing" to not be synonymous terms. In *Evans v. N. Y. & P. S. Co.,* 163 Federal 405, 406, it was held that where a steamship company acquired from a warehouse company the right to use a wharf and warehouse and the steamship company placed cargo in the warehouse, the cargo was not "stored" within the legal meaning of that term as used in the bill of lading because it was not delivered into the possession of the warehouseman as a bailee.

Now the Emergency Court of Appeals holds in its

opinion that even if it be held the renting of space to car owners for the parking of their automobiles on the rented space constitutes "storage" within the meaning of the Act, still they are not subject to the regulation of the Act unless they are furnishing services to the car owners in addition to renting them space (R. 129).

The opinion then proceeds to say that Petitioners mark off their lot with suitable spaces for the parking of automobiles; that they light it, clean it and keep it in suitable condition; that they provide a common entrance for the use of all those who desire to store their cars upon the lot as well as a common means of exit; and that because of these facts they are furnishing services in connection with the storage and therefore subject to the control of the Administrator. This holding is in direct conflict with the decision of the Supreme Court in combined cases of *Walling v. Kirschbaum Co.* and *Walling v. Arsenal Building Corp.*, 316 U. S. at 526. In this case the Supreme Court holds:

"Selling space in a loft building is not equivalent of selling services to consumers."

In loft buildings the owners mark off or designate suitable spaces for the placing of the commodities owned by the tenants. They light the building, clean it and keep it in suitable condition. They provide a common entrance for use of all those who place commodities in the spaces rented and also a common means of exit. They go further. They furnish elevators

and operate them; they heat the building and often cool it; and they maintain rest rooms for their tenants. The decision of the Supreme Court holding that selling space in a loft building is not the equivalent of selling services to consumers conclusively shows, we think, that there was error in the decision of the Emergency Court of Appeals in the case at bar. The two decisions are wholly inconsistent and cannot both stand. The use of the words "service" and "service establishment" by Congress after they had been construed by the Supreme Court, manifested an intention that they should be construed as they had been previously construed.

As pointed out in the brief accompanying this petition the decisions of the Circuit Courts of Appeals and of the Supreme Court have been consistent with the view expressed by Mr. Justice Frankfurter in the *Kirschbaum* case.

Now the Act itself furnishes a guide as to what is meant by the provision that the term "commodity" includes "services rendered otherwise than as an employee, in connection with the processing, distribution, installation, repair, or negotiation of purchases or sales of a commodity." Webster's New International Dictionary defines "service" as: "Act of serving; the occupation of a servant; the performance of labor for the benefit of another, or at another's command * * * The deed of one who serves, labor performed for another."

The word ordinarily means personal service. *People*

v. McKeen, 243 Pacific 898-899. As used in the Act it evidently means "personal service." This is shown by the expression: "otherwise than as an employee." Services rendered by an employee are personal services and the kind evidently referred to in the Act. It is quite clear that where the owner delivers his property into the possession of a third party to be held in custody of the third party and same is left until the owner calls for re-delivery, the third party is performing a service in connection with storage, but that where the owner retains possession of the property and puts it away for himself in a place owned or controlled by him for his future use or consumption, and the renter of the property merely furnishes him a place to keep it, it is not a service "in connection with storage."

If it is held that "storage" has two meanings, one indicating the delivery of property into the hands of some person, not the owner, for safe-keeping, and the other denoting the putting away of property by the owner for future use or consumption where the property is put away in a space owned or controlled by the owner, the former is in keeping with the requirement of the Act that there must be a service rendered in connection with the storage, while the latter is not. If it be conceded that there are these two kinds of storage, the former is evidently the storage contemplated by Congress.

The Emergency Court of Appeals suggests that the relationship between petitioners and a car owner is that of licensor and licensee. However, the car owner

has exclusive right to occupy the particular space rented for the duration of the rental period to the exclusion of all others, so the relationship is in fact that of landlord and tenant. The relationship is so defined in 6 Am. Jur. 189 where it is said:

> "Usually there is a bailment when an automobile is delivered to attendants at a parking station, although the transaction amounts to a mere rental of parking space, where the circumstances negative a delivery of possession or an intention to leave the car in the care and charge of the properietors."

It can make no legal difference, however, whether the relation is "landlord and tenant" or "licensor and licensee." The fact that the car owner renting the space has a means of ingress to and egress from the space rented cannot constitute a service rendered in connection with storage. The right of ingress and egress is a fundamental incident to every tenancy. Renting space is not selling services because the space rental confers upon the tenant the right of ingress and egress in connection with the space rented. Marking off the space rented cannot constitute a service in connection with storage. It is merely the designation and identification of the rented space so that the space owner and the space renter may understand what space is being rented. Lighting the lot and keeping it clean and in a suitable condition cannot constitute services rendered in connection with storage. An owner keeps premises which he desires to rent lighted, clean and in a suitable condition for the owner's benefit and if any services are rendered in this

connection they are rendered to the owner and not to the renter of space. It is not suggested that during the rental period on any particular space to any particular car owner anything is ever done in the way of cleaning or placing in a suitable condition the rented space or any other part of the lot. Certainly it is far fetched to say that if at the end of the day the empty lot needs cleaning or anything else to make the rental thereof desirable to prospective renters next day, this constitutes services in connection with storage rendered to an unidentified prospective renter who merely rents the space and takes it as he finds it with no obligation whatever on the part of the lot owner to do anything in connection with the rented space, or in connection with the car occupying the space, or to perform any service whatever for the owner in connection with the rental.

If lighting the lot constitutes a service rendered in connection with storage, this can have no application whatever to daylight rental of space and the Administrator's order attempts to cover both night and day rentals.

The Act says that "The term 'commodity' * * * also includes services rendered otherwise than as an employee in connection * * * with storage of a commodity." If the Administrator is authorized to regulate the charge for any services rendered in connection with the space rental, if there are such services, he has made no attempt to regulate the price of such services but has confined his efforts to the regulation of the charge for the rental. Since the Administrator

is without authority to regulate rentals and has made no attempt to regulate charges, if any, for the services which he alleges were rendered in connection with the commodity occupying the rented space, his action is without any authority under the law.

It was for Congress to determine whether it would or would not provide for ceilings on business rentals. In the exercise of its discretion it saw fit to confine ceilings on rentals to rentals on houses used for residential purposes in defense areas. Congress could have occupied a much wider field, but it did not. It can now extend the field whenever it desires to do so, but the Administrator has no such power.

There are many reasons why the field should not be extended. Some of these have been pointed out in the accompanying brief. If Congress decides to enlarge the field of rent regulation it will certainly regulate the rentals to be paid by your petitioners to the land owner as well as the rentals to be charged by your petitioners to car owners. When the Administrator attempted to fix the ceiling rentals in the case at bar he used for comparison a lot in the suburbs leased to Shoemaker for a barbecue stand. Shoemaker was renting part of his space to car owners without service of any kind. Petitioners' lot was 22 blocks away in the heart of the city and the rental per square foot paid therefor was ten times that paid by Shoemaker. The Administrator attempted to fix the rent to be charged by petitioners at approximately 2 1/2 times the rent per square foot charged by Shoemaker. The Administrator ignored the difference in the rentals

charged by the owners to Shoemaker and your petitioners, respectively, evidently because he had no control over such rentals (R. 29-31). If Congress had intended to regulate rentals such as the Administrator has undertaken to regulate in this proceeding, it would have regulated the rentals all the way back to the owner of the fee and not have adopted such an anomalous system as the Administrator here contends for.

The intention of Congress may be inferred from the fact that while this case was under submission in the Emergency Court of Appeals an attempt was made to get Congress to broaden the control over rentals so as to include business rentals as well as defense area residential rentals. The effort was wholly unsuccessful. It seems, however, that the decision of the Emergency Court of Appeals in this case permits the Administrator to do by indirection what Congress has not done or intended to do.

After the Administrator had made his order fixing the ceiling on the rental charges in this case, he filed in the District Court of the United States for the Southern District of Texas an injunction suit to compel petitioners to refrain from making any higher charges for such rentals. The District Court refused to issue any such injunction (R. 66, 117).

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal this court, directed to the United States Emergency Court of Appeals, commanding that court to certify this cause to this court for review and determination,

as provided by the acts of Congress, and that your petitioners may have such other and further relief in the premises as to this court may seem appropriate and proper.

D. M. CARTHERS, SPENCER J. SCOTT AND LEE PRICE, A CO-PARTNERSHIP DOING BUSINESS AS ALLRIGHT PARKING SYSTEM, LIMITED.

BY D M Carothers

Walter F Brown

WALTER F. BROWN

Durell Carothers

DURELL CAROTHERS

Attorneys for Petitioners,

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Houston 2, Texas.

THE STATE OF TEXAS,
COUNTY OF HARRIS.

D. M. Carothers, being duly sworn, says that he is a member of the co-partnership of Allright Parking System, Limited, composed of D. M. Carothers, Spencer J. Scott and Lee Price, the petitioners in the foregoing petition; that the affiant, D. M. Carothers, is duly authorized by the other members of the partnership to make this affidavit; that affiant has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me, this 2nd day of May, 1945.

T. J. Anderson

Notary Public, Harris Texas

T. J. ANDERSON
Notary Public, in and for Harris County, Texas
My Commission Expires June 1, 1945